

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.223 of 1991

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For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

1 to 5 : NO

STATE OF GUJARAT

Versus

GAMETI YUSUF AUSAMAN

Appearance:

Shri B.Y. Mankad, ADDL. PUBLIC PROSECUTOR for Petitioner
MR RAVI R TRIPATHI for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL

Date of decision: 07/10/98

ORAL JUDGEMENT :

The State has preferred this appeal being aggrieved by the order of acquittal recorded by the learned Judicial Magistrate, First Class, Junagadh dated 21.12.1990 in Criminal Case No.510 of 1987, wherein the accused was tried for offences punishable under secs.279, 304A of the Indian Penal Code and secs.112 and 116 of the Motor Vehicles Act.

2. On 7.12.1985 a complaint was lodged before the Police for an incident wherein the unfortunate Mehdi Hussain lost his life in fatal accident at the hands of the accused. It transpires that on the date of the incident, Zarinaben, PW 1 in the company of her three daughters, namely, Hamida, Hanifa and Bilkis; and her two sons Mehdi Hussain and Jikar, went in a rickshaw to reach the place of her brother in law. On reaching Dilawarnagar, the rickshaw stopped on a road side. All of them got down from the rickshaw and Zarinaben was engaged in making payment to the rickshaw driver. In the meanwhile her son shouted that brother has come under the bus. From the evidence it appears that the deceased after the impact come under the front wheel and thereafter his head was crushed under the rear wheel of the bus. As alleged by the prosecution the bus halted after travelling certain distance. The trial court on appreciation of evidence held that the accused is not guilty on the ground that a new theory is brought before the court and it is not possible to believe that the bus was in speed and the prosecution has failed that the incident in question took place on account of rash and negligent driving by the accused.

3. In the cross examination of Zarina, PW 1, she has stated that the ST Bus was local schedule bus running between Vanthali and Junagadh; at nearby place there is a bus stop. From the judgment it transpires that from the scene of occurrence the bus stop is hardly 25 ft. away. She admitted that her attention was drawn after hearing cries raised by her son Jikar, when she was making payment. Before she could reach the scene he expired. She has admitted that after getting down from the rickshaw which was parked on a road side her three daughters and two sons were with her. From the cross examination it appears that she has denied the suggestion having stated before the Police that the hand of her son came under the wheel and thereafter while taking turn, his son came under the bus.

4. Hanifaben, PW 2, who was along with her mother has stated that Jikar, her brother, raised shout that Mehdi has come under the bus. She stated that first under the front wheel the hand of the deceased was crushed and as the driver applied breaks his head dashed with the bus and thereafter his head was crushed under the rear wheel. It is thereafter the driver stopped the bus. Hanifa was 15 years of age at the time when she gave evidence before the court. She has stated that Jikar saw the incident and only after he raised shouts

the incident was seen by her. A suggestion is made to this witness that when her brother was crossing the road, in the process of crossing he dashed with the bus to which she has denied. The suggestion that she has not seen the incident in question is also denied.

5. The prosecution has examined Jikar, aged 13 years, who stated that after dropping them on the road side the rickshaw was stopped in the opposite direction, i.e. road side. He has specifically stated that they got down from the rickshaw on the side of the road where his uncle's house is situated and his mother was on the other side making the payment. His say is that they were standing on the shoulder of the road and in the meanwhile the ST Bus came from the Vanthali direction. He went backward, but his brother's hand came under the right wheel. Thereafter his head was crushed under the rear wheel of the bus. The suggestion put forward by the defence is that after getting down from the rickshaw the deceased started running on the other side of the road towards the house of his uncle and in the meanwhile he dashed with the rear wheel of the bus. He has stated that his attention was drawn only after sound. He has stated that the bus stopped on applying breaks. From the aforesaid suggestion it was submitted that the boy must have tried to cross the road and in that process he must not have noticed the approaching bus and the unfortunate incident is a mere accident.

6. In the instant case the trial court has seriously overlooked the clinching evidence placed on record vide exh.11, the Panchnama of the scene of occurrence and at exh.14 the accident report duly signed by the Inspector of Motor Vehicles, Junagadh. Turning to the accident report, exh.14 it clearly appears that the breaks and break connections were in order; the condition of steering and connections of engine and engine control were in order. Reading the report it appears that the vehicle was in order. there was no defect whatsoever. If the breaks would have applied it would have worked and the vehicle would have stopped within a reasonable distance as mentioned in the Motor Vehicles Rules. The Panchnama of the scene of occurrence points out that the road is 22 ft. wide having 6 ft. shoulder on each side. The incident in question has occurred just opposite Railway Quarters and 12 ft. from the northern side of the road, 10 ft. of the southern side of the road. It appears that within the range of 7 ft. at several places blood stains were noticed, parts of body (brain) was also noticed which was crushed. It also appears that at a distance of 9 ft. there was blood mark covering an area

of about 1 ft. It clearly reveals that there were no break marks or any other noticeable marks on the road. The important aspect requires to be noted is that the incident in question has taken place at a distance of 35 ft. from the Railway crossing and the Bus was found in stationary condition at a distance of 73 ft. from the scene of occurrence. On the rear right inner wheel blood marks were seen. It appears that from the Rules framed in 1989 the overall length of the Motor Vehicle other than a Trailer in case of transport vehicle with frame having two or more axils should be 11.25 mtrs. Looking to the size of the bus and the distance from the Railway crossing it can be said that hardly the bus has travelled any distance from the crossing and the incident in question has taken place. Under the Rules known as Bombay Motor Vehicle Rules in force at the relevant time the overall length of public service vehicle having two axils was 10 mtrs. Considering the fact that on both the sides beyond the axil there is a body of the bus and the length of the bus must be 35 ft. Therefore, immediately after crossing the Railway Crossing the incident in question has taken place. It is expected that at the Railway Crossing the bus should be slow. The Railway Crossings ordinarily have bumps. Taking every thing into consideration and looking to the distance, the bus was required to travel after crossing the Railway Crossing; it was required to be stopped at a very short distance as there is a bus stop which is clear from the record. The bus stop was at a distance of 25 ft. from the scene of occurrence. It is surprised that the bus travelled upto 73 ft. from the place of incident as transpired from the Panchnama. Therefore, the evidence of the witnesses is consistent with the record of the case. If the bus was required to cross the Railway Crossing and at a distance of about 55 ft. was required to be stopped from the Crossing, then Bus could not be in speed. However, we find that even after the incident in question the bus travelled upto 73 ft. in all after travelling 108 ft. from crossing and no break marks were noticed. This itself speaks volumes about the manner in which the Bus was driven by the accused.

7. The trial court failed to appreciate that the evidence was recorded after a period of three years. When the incident in question took place, Jikar must be of 10 years and Hanifa of 12 years. This can be said from the record of the court; at the time of recording evidence and the date of incident in question.

8. The theory put forward by the accused that the boy, all of a sudden, ran is also not possible to believe

because there are no blood marks either on the front wheel or rear wheel of the left side. The incident in question has taken place not before crossing the road as stated by the learned advocate, but must have taken place after the boy already crossed the road. If, before crossing incident took place, boy would be under left front wheel. The driver was coming from the Railway Crossing. He would have seen the person crossing the road. It was his duty to stop the bus, more particularly, a child was crossing the road. But having failed to notice the child and stopping the vehicle after 73 ft. from dashing spot, it is not proper to say that the boy must have ran through and came under the bus. Jikar, PW 3 stated that they already crossed the road and they were on the other side of the road and the bus which came in full speed caused the accident, is the believable version.

9. In view of the above evidence it can be said that the trial court committed error in appreciating the evidence from the record. The only conclusion that can be drawn is that the accused is responsible for his rash and negligent driving. The order of acquittal is, therefore, required to be quashed and set aside.

10. However, the question is that the incident in question took place on 7.12.1987 and the matter is being heard after a period of 11 years. The accused is now aged about 64 years and has no business or service and is living a retired life and is passing his days in a mosque. Shri Tripathi, learned advocate stated he has no means of regular income and that if he is asked to pay compensation of a sizeable amount, then according to his present position, status, it will not be possible for him to pay the amount.

11. Considering the fact that the Appeal is being heard after lapse of about 11 years from the date of the incident in question, the age of the accused and the financial position of the accused, after hearing the accused, the following order is required to be passed.

12. The order of acquittal is quashed and set aside. The accused is convicted for offences punishable under sec.279, 304A of Indian Penal Code as well as secs.112 and 116 of the Motor Vehicles Act and is ordered to pay fine of Rs.100 (Rupees one hundred only) within four weeks. In default of payment of fine the accused to undergo simple imprisonment for seven days. Looking to the facts and circumstances of the case, it would be just and proper to direct the accused to pay compensation of

Rs.3000/- (Rupees three thousand only) to the nearer and dearer of the deceased Mehdi Hussain. Shri Tripathi, learned advocate has requested the Court to grant time to make payment. Considering the facts and circumstances of the case, two months time is granted to the accused to pay the amount of compensation. The amount shall be deposited in the trial court and on verification the amount shall be paid to Zarinaben, the mother of the deceased.

13. The Appeal stands allowed accordingly.

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